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317543—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 965

BURK BROTHERS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion and dissenting opinion in the court below (R. 218–229)[1] are reported in 117 F. (2d) 686. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 37–65) are reported in 21 N. L. R. B., No. 126.

[1] Pursuant to stipulation of the parties (R. 232–233), the printed record herein for purposes of the petition for certiorari consists of the appendix to the brief of Burk Brothers, filed in the court below, and the supplemental proceedings before the United States Circuit Court of Appeals for the Third Circuit.

JURISDICTION

The decree of the court below (R. 229–231) was entered on February 17, 1941. The petition for a writ of certiorari was filed on April 18, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

The sole question is whether there is substantial evidence to support the Board's findings that petitioner discriminatorily discharged Charles Majerick and Frank Majerick in violation of Section 8 (3) and (1) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 37–65). The facts found by the Board and shown by the evidence may be summarized as follows:[2]

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

When the National Leather Workers' Association, herein called the Union, began to organize petitioner's employees in the spring of 1937, various of petitioner's supervisors, including foremen possessing the authority to hire and discharge, expressed opposition to the Union and warned employees that members of the Union would be discharged (R. 43–45; R. 69–70, 80, 83–84, 101, 130, 132, 134–135, 149–151, 168). The four employees who most actively assisted the Union drive were Kosta Kula, Joseph Zalot, Charles Majerick, and Frank Majerick (R. 42, 46; R. 67–68, 79, 84, 105–106, 117, 129); the Board found, upon substantial evidence, that all four were subsequently discriminatorily discharged (R. 45–61).[3]

Charles Majerick, employed since 1934, was discharged by his foreman, Miller, on August 2, 1937, a few days after winning an award from the Union for having enlisted the largest number of members (R. 52–53; R. 77, 79, 84, 85–86). Miller was one of the supervisory employees who had warned that union members would lose their jobs (*supra,* this page). Coincidentally with Majerick's rise to prominence in the Union, Miller's friendly attitude toward Majerick changed (R. 55–56; R. 87), and several days before Majerick's discharge, Mil-

[3] Since the petition does not challenge the validity of the findings as to Kula and Zalot, we limit our further discussion to the two Majericks.

ler pointedly inquired of an employee whether Majerick had solicited him to join the Union (R. 43, 53; R. 83–84, 101).

Petitioner sought to justify the discharge on two grounds. The first was a quarrel on June 22, 1937, between Majerick and an assistant foreman in the suede department to which Majerick had shortly theretofore been transferred, during which Majerick used obscene language (R. 52–53; R. 80–82, 190, 196–198). Although the superintendent told Foreman Miller to discharge Majerick, Miller, who had full control over the department, did not do so but merely transferred Majerick back to his former duties (R. 53, 55; R. 144–145, 168, 194). Miller admittedly made light of the incident at the time (R. 53, 55; R. 144). At the hearing before the Board, Miller assigned as the reason for Majerick's discharge in August, not the argument in June, but the fact that work was curtailed in August, stating that Majerick was laid off in order of his seniority (R. 54; R. 160–161, 162, 145).[4] But this second reason, too, as the Board found (R. 55), is not supported. Although laid-off employees in petitioner's plant are paid on the next succeeding pay day, Majerick was paid off immediately, a procedure customary only in cases of discharge (R. 46–47, 53, 55; R. 86–87, 110, 132). Furthermore, al-

[4] In a letter to the Board's regional office dated a few days after the discharge, petitioner's vice president likewise assigned this second reason as the only one (R. 54; R. 206–207).

though petitioner admittedly followed strict departmental seniority in making lay-offs on account of reduction of force (R. 47; R. 153, 211, 213–214), at least 9 employees junior to Majerick were retained when he was let go (R. 54, 55; R. 87–88). The Board, rejecting petitioner's explanations, found that the true reason for Charles Majerick's dismissal was his prominence in the Union (R. 54–55, 56).

Frank Majerick, the father of Charles Majerick, was employed by petitioner from 1907 to 1911 and from 1928 until his dismissal by Foreman Miller on January 28, 1938 (R. 56; R. 115–116). He was one of the most active Union members and one of the few who dared to wear his union button at the plant (R. 56; R. 67–68, 117, 125). Although petitioner contended that Majerick's release was a lay-off for lack of work and in accordance with seniority, the evidence establishes that Majerick was senior to two employees who were retained when he was let go (R. 57–60; R. 120–122).[5] The Board found that

[5] While one of the two was the son of Foreman Miller and, as the Board found (R. 59), considerations of kinship probably prompted his retention, no such reason appears in regard to Mitas, the other retained employee. The Board discredited petitioner's claim (on which it rested a contention that Mitas' seniority exceeded that of Majerick) that Mitas was on "leave of absence" from 1934 to 1937, during which time Mitas was severed from petitioner's pay roll for lack of work and was employed elsewhere (R. 58–59, 60; R. 72, 121–122, 142–143).

petitioner had discriminatorily discharged Frank Majerick because of his union activities (R. 60).

The Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (R. 63–64); its order required petitioner to cease and desist from its unfair labor practices, to reinstate and make whole Charles and Frank Majerick, to make whole Zalot and Kula who had been reinstated, and to post notices (R. 64–65).

On April 17, 1940, petitioner filed in the court below a petition to review and set aside the Board's order (R. 1–4). The Board answered, requesting enforcement of its order (R. 4–9). On February 3, 1941, the court, with Clark, J., dissenting in part, handed down its opinion (R. 218–229), and on February 17, 1941, entered its decree (R. 229–231), enforcing the Board's order.[6]

ARGUMENT

Petitioner's sole contention, that the findings of unfair labor practices as to Charles and Frank Majerick are not supported by substantial evidence, presents no question of general importance. Moreover, the evidence summarized in the Statement affords adequate support for the challenged findings.

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[6] The form of notices was modified in a manner requested in the Board's brief (R. 221, 230–231).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1941.